

7027



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20545

B-114860

RESTRICTED — Not to be released outside the General Accounting Office except on the basis of specific approval by the Office of Congressional Relations.

The Honorable John D. Dingell
Chairman, Subcommittee on Energy
and Power
Committee on Interstate and
Foreign Commerce
House of Representatives

JULY 18, 1978

RELEASED

Dear Mr. Chairman:

This is in response to your letter dated March 29, 1978, requesting an investigation of possible improprieties on the part of the Department of Housing and Urban Development (HUD) in revising its Minimum Property Standards. In particular, you asked us to determine (1) to what extent and manner HUD permitted industry officials to develop the regulations and review and obtain copies thereof before they were available to the general public, (2) why consumers were not afforded the same opportunity as industry, and (3) how Mr. Robert Elliott, a former HUD General Counsel, obtained a copy of the regulations and whether he has violated any conflict of interest law or regulation in this matter.

In summary, our work showed that:

- Industry's involvement in the development of the revision to the Minimum Property Standards was limited to furnishing technical data, such as the availability and cost of insulation.
- The release of the revised standard to the National Association of Home Builders, prior to publication, was made by a HUD employee who could not be identified by us or HUD. The release of the revised standard was in violation of HUD policy since it was done without the approval of HUD's General Counsel. No conflict of interest laws have application to this release.
- HUD did not request comments from consumer groups prior to publication because it believed everyone would have an opportunity to comment when the revised standard was published in the Federal Register as a proposed rulemaking.

RELEASED

EMD-78-87
(00342)

--While our Office does not have jurisdiction to render formal legal opinions on conflict of interest questions, it is doubtful that Mr. Robert R. Elliott's actions in representing the National Association of Home Builders in a lawsuit against the Farmers Home Administration, could be considered a violation of conflict-of interest laws.

HUD's decision to revise the Minimum Property Standards was in response to the Administration's National Energy Plan. The objective of the revision was to establish an interim building standard focusing on energy conservation while HUD was developing the national energy conservation performance standards for buildings as required by the Energy Conservation and Production Act (P.L. 94-385).

Draft copies of the revised Minimum Property Standards were being circulated about December 1977 to various divisions in HUD for the purpose of obtaining comments from HUD officials prior to publication in the Federal Register as proposed rulemaking.

Development of the revised standard

HUD's Architectural and Engineering Division developed the revised standard; however, technical data were furnished by industry associations as well as other Government agencies. While the purpose of the revised standard is to conserve energy, the cost of the energy saving improvements are to be offset by savings in utility costs in order for the new standard to be cost effective. The technical data needed to determine cost effectiveness and availability of various building materials was obtained by HUD from the insulation industry, lumber industry, Department of Commerce, Department of Energy, National Bureau of Standards, and the National Association of Home Builders.

HUD's usual practice, when revisions are made to existing regulations which are considered major, is to ask up to 200 organizations to review and comment on the revision, prior to publication in the Federal Register. Organizations commenting on major revisions include construction firms, building trade associations, architectural firms, insurance companies, governmental agencies, and consumer groups. HUD

officials told us that in this case comments were not solicited from the above groups during the development stage because:

--In their opinion, the revised standard was not a major change, but was simply an upgrading of standards established in 1976.

--Public comments on a similar standard published in 1977 by the Farmers Home Administration were reviewed by HUD and used as an aid in developing their own standard.

--Public comments were to be obtained when the revised standard was published in the Federal Register as a proposed rulemaking.

Availability of the draft revised standards

Mr. Robert R. Elliott, the former HUD General Counsel, told us that he received a copy of the draft revised standard from a National Association of Home Builders official. This was confirmed by the official who in turn received it from a HUD source which he would not identify.

HUD's policy on disclosure of proposed regulations is spelled out in a Secretary's memo dated July 28, 1976. Under this policy, no proposed regulation may be shown outside of HUD prior to its publication in the Federal Register without first clearing such disclosure with the General Counsel. This policy was reemphasized by the Secretary's memo dated February 3, 1978. The release of a copy of the revised standards to the National Association of Home Builders was in violation of HUD policy since clearance was not requested of, nor given by HUD's General Counsel. However, no conflict of interest laws have application to this release.

The timing of the Secretary's memo, reemphasizing the policy against premature disclosure of draft standards, may have impeded the National Resources Defense Council from obtaining a copy, because it was shortly after the issuance of the memo that the Council requested a copy.

Representing the National Association of Home Builders in lawsuit

Our office does not have jurisdiction to render a formal legal opinion as to whether Mr. Elliott violated a conflict of interest law or regulation in representing the Association in this lawsuit. Such a determination would have to be made

by HUD in coordination with the Department of Justice. However, we have examined the conflict of interest laws which have possible application to the situation in question and have the following comments to offer.

It appears that on the basis of available facts, the only criminal conflict of interest statute which has possible applicability is 18 U.S.C. 207, which restricts former employees from representing others with respect to certain matters they may have participated in or had official responsibility for during their Government service. More specifically, section (a) of 18 U.S.C. 207 permanently bars a former employee from knowingly representing anyone in a particular matter involving specific parties in which the United States has an interest and in which he participated personally and substantially. Section (b) prohibits, for a period of one year, a former employee from personally appearing before an agency in a representative capacity concerning a particular matter involving specific parties in which the Government has an interest and over which he had official responsibility within the past year.

Mr. Elliott is representing the National Association of Home Builders in a lawsuit against the Farmers Home Administration, Department of Agriculture, attempting to enjoin the Administration from implementing its proposed thermal performance regulations on grounds that HUD was about to issue its similar performance standards, discussed earlier. Mr. Elliott had obtained a draft copy of HUD's standards as evidence in support of this lawsuit. Because of Mr. Elliott's former position as General Counsel of HUD, a question was raised whether his representing the Association is in violation of any conflict of interest law or regulation.

According to HUD officials, the technical development of the proposed insulation standards began in early 1977. The proposed standards were submitted to HUD's Office of General Counsel in January 1978 for clearance and approval. Since Mr. Elliott's tenure as the General Counsel officially ended on January 20, 1977, it is highly unlikely that the development and issuance of the proposed standards could be considered as being a "particular matter" in which Mr. Elliott either "personally and substantially participated" or had "official responsibility" for within the meaning of 18 U.S.C.

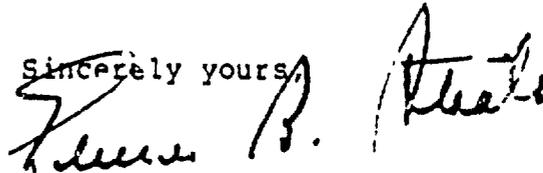
B-114860

207. For this reason, it is doubtful that Mr. Elliott's representative actions with respect to the proposed standard could give rise to a violation of 18 U.S.C. 207.

We discussed the results of our work with HUD officials. However, in accordance with your request, we did not obtain written views from HUD or any other person concerning this report. As arranged with your office, unless you announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time we will send copies to interested parties and make copies available to others upon request.

We appreciate the opportunity to have been of assistance to you in this matter.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Kenneth B. Auer".

Comptroller General
of the United States